

IN THE HIGH COURT OF SINDH, KARACHI*Present:**Mr. Justice Mohammad Karim Khan Agha**Mr. Justice Abdul Mubeen Lakho,***Special Criminal A.T. Appeal No. 175 of 2019
Confirmation Case No.07 of 2019**

Appellants	1. Syed Altaf Hussain Shah son of Syed Sikander Ali Shah 2. Syed Haider Ali Shah @ Zain son of Syed Altaf Hussain Shah 3. Syed Muhammad Arif Shah son of Syed Altaf Hussain Shah 4. Shahid Mehmood son of Muhammad Ali All through Mr. Mamoon A.K. Sherwani, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.
Date of Hearing	21.04.2021 and 23.04.2021
Date of Announcement	04-05-2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellants Syed Altaf Hussain Shah son of Syed Sikander Ali Shah, Syed Haider Ali Shah @ Zain son of Syed Altaf Hussain Shah, Syed Muhammad Arif Shah son of Syed Altaf Hussain Shah and Shahid Mehmood son of Muhammad Ali have assailed the impugned judgment dated 15.06.2019 passed by Learned Judge, Anti-Terrorism Court No.XVII, Karachi in Special Case No.1021 of 2018 arising out of Crime No.389 of 2018 under Section 302/376(1)/34 PPC r/w Section 7 of ATA, 1997 registered at PS Sachal, Karachi whereby the appellants were convicted and sentenced u/s.265-H(2) Cr.P.C. as under:-

"Under Section 302(b)/34 PPC each and sentenced to death as (Tazir) subject to confirmation by this court with directions to pay fine of Rs.1,00,000/- each and in default of payment thereof, shall undergo S.I. for six months more;

4

Under Section 376 PPC each and sentenced to death subject to confirmation by this court, with directions to pay fine of Rs.1,00,000/- each and in default of payment thereof, shall undergo S.I. for six months more;

Under Section 7(a) of Anti-Terrorism Act, 1997 each and sentenced to death subject to confirmation by this court, with directions to pay fine of Rs.1,00,000/- each and in default of payment thereof, shall undergo S.I. for six months more."

2. The brief facts of the case as stated by the complainant are that he resides in village of Ganhwar Lahbor, Taluka Naseer Abad District Kambar Shahdadkot, holding CNIC No.43403-0356808-5 and having mobile No.0344-0139920 and engaged in labour work. His younger sister "Kainaat" aged about 6-7 years used to live in Karachi with her elder sister namely Reshma wife of Arif Shah since last one year. His father Syed Hussain Shah has died. He received information through phone from PS Sachal that his younger sister "Kainaat" has been killed. On such information he alongwith mohalla people namely Abdul Waheed Dero, Abdul Samad Dero and Pervaiz Ahmed came at PS Sachal and then went to the house of his sister Rukhsana at Bhitai Abad and she disclosed that yesterday on 31.07.2018 at about 1600 hours suddenly Kainaat was become ill on that Arif Shah immediately took her to the hospital where it was informed that she has been expired. On reaching at PS he came to know that Kainaat has been raped and then killed by strangulation. From the spot enquiry he came to know that accused persons namely 1. Shahid Mehmood s/o Muhammad Ali, 2. Altaf Shah s/o Sikander Shah, 3. Arif Shah @ Jamshed s/o Altaf Shah and 4. Haider Shah @ Zain s/o Altaf Shah have committed Zina upon Kainaat and then killed her by throttling her neck. He claimed against the above named accused persons for committing rape upon his minor sister Kainaat and then murdering her by throttling her neck.

3. After completing thorough investigation charge was framed against accused persons which they pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 11 witnesses and exhibited various documents and other items. The statement of

accused persons were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them. None of them gave evidence on oath however between them they called three DW's in support of their defence case which was one of alibi.

5. After appreciating the evidence on record the trial court convicted the appellants and sentenced them all as set out earlier in this judgment. Hence, the appellants have filed this appeal against their conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 15.06.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel appearing on behalf of the appellants contended that they were innocent of any wrong doing and had been falsely implicated in this case by the police in collusion with the complainant; that there was no eye witness evidence against them, that there was no last seen evidence against them, that there was a delay in filing the FIR of 26 hours which lead to fabrication of the case against the appellants by the complainant; that the confession made by one of the appellant Arif Shah before the judicial magistrate was not made with sufficient reflection time and as such it could not be relied upon; that no recoveries were made from the appellants at the time of their arrest to link them to the rape and murder; that in fact no rape had been made as the deceased vagina was intact as per the medical evidence; that there was no chemical report; that the clothes recovered by the police were all planted; that there was no CDR to link the appellants to the house at the time when the rape and murder took place; that the only evidence against the appellants to link them to the crime was DNA evidence which was circumstantial evidence and had been planted by the police and was not sufficient, even if believed, on its own to lead to the conviction of the appellants. All the appellants had in effect produced alibi witnesses and that for any of the above reasons they should be acquitted of the charge by being extended the benefit of the doubt to each of them. In support of his contentions he has placed reliance on **Tariq Pervez v. The State** (1995 SCMR 1345), **Mst.**

Zohra Bibi v. The State (2013 P. Cr.LJ 772), **Hashim Qasim and another v. The State** (2017 SCMR 986), **Said Muhammad v. The State** (2009 P. Cr.LJ 604), **Muhammad v. The State** (2009 P Cr.LJ 608), **Khani Zaman v. The State** (1983 SCMR 573), **Raza and another v. The State and 2 others** (PLD 2020 Supreme Court 523), **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274), **Kareem Nawaz Khan v. The State through PGP and another** (2016 SCMR 291), **Kaleemullah v. The State and another** (2018 YLR 2363), **Shakir Muhammad alias Shakeel and another v. The State** (2019 P Cr.LJ Note 120), **Ali Haider alias Papu v. Jameel Hussain and others** (PLD 2021 Supreme Court 362), **Afaq Ahmed v. The State** (2020 YLR 676), **Muhammad Akram v. The State** (2009 SCMR 230), **Ali Gul v. The State** (2020 MLD 952), **Muhammad Jabran and others v. The State** (2020 SCMR 1493), **Lal Khan v. The State** (2006 SCMR 1846), **Muhammad Ehsan v. The State** (2006 SCMR 1857) and **Nazeer Ahmed v. The State and others** (2019 SCMR 594)

8. On the other hand learned DPG who was also representing the complainant has fully supported the impugned judgment and has contended that the prosecution has proved its case beyond a reasonable doubt based on circumstantial evidence through the evidence of the PW's, the early arrest of the appellants, the confession of appellant Arif Shah before the judicial magistrate and the DNA evidence which conclusively linked the appellants to the rape and murder of the deceased minor girl which was also supported by medical evidence; that there was no need for a chemical report in the light of the DNA report; that the DW's were all interested witnesses and had given false alibi's to the appellants and as such all the appeals should be dismissed. In support of his contentions he has placed reliance on **Salman Akram Raja and another v. Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others** (PLJ 2013 SC 107), **Ali Haider alias Papu v. Jameel Hussain and others** (PLD 2021 Supreme Court 362), **Sheraz Mehmood v. The State and another** (2005 YLR 2467), **Muhammad Ali v. The State** (2020 MLD 1447), **Zahid and another v. The State** (2020 SCMR 590), **Imran Ali v. The State** (2018 SCMR 1372), **Noor Muhammad v. The State** (1999 SCMR 2722) and **Dadullah and another v. The State** (215 SCMR 856).

3

9. We have heard the arguments of the learned counsel for the appellants as well as learned DPG who was also representing the complainant, gone through the entire evidence which has been read out by the counsel for the appellants, and the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. At the outset we have observed that this is a very barbaric case where a 7 year old minor girl has been raped and strangled to death by 4 adults. We however make it clear that our findings are based solely on our re appraisal of the evidence on record and the relevant law. As was pointed out in the recent supreme court case of Naveed Asghar V State dated 07.12.2020 (unreported) in Jail Appeal No.147 of 2016 in reappraising the evidence factors such as the gruesomeness or heinousness of the offense are completely irrelevant and only come into play when determining the appropriate sentence to be handed down if the courts reappraisal of the evidence leads it to upholding the conviction of the appellant(s).

11. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt through the evidence of PW's, especially PW 4 Dr.Zakia Khursheed, her post mortem report and DNA results that on 31.07.2018 at about 1600hrs that minor girl Kainaat (the deceased) was raped/seriously sexually assaulted and murdered by strangulation in the house situated at Katchi Abadi Bhitaeedabad Street No.16 where she was residing at the time.

12. The only issue therefore before us is who raped/seriously sexually assaulted and murdered the deceased at the aforesaid time, date and location.

13. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against all the appellants for the following reasons:-

(a) Admittedly there was no eye witness to the deceased being raped and murdered by the appellants or any one else. This is not unusual in cases of rape

followed by murder as the rapists are not likely to expose themselves to witnesses and thus a large number of such like cases are decided on the basis of circumstantial evidence.

(b) No recovery was made from any of the accused. We consider this irrelevant in a rape case coupled with murder through strangulation based on the particular facts and circumstances of this case since what recovery is expected to be made from a rapist in case of manual strangulation? The answer is nothing unless the raped person was held at gun point or with a knife to the neck which was not the case in this matter.

The law on circumstantial evidence.

(c) With regard to circumstantial evidence, upon which the prosecution case/ evidence is based, to lead to a conviction in a capital case it was held as under in **Fayyaz Ahmed V State (2017 SCMR 2026)** at P.2030 para's 5 and 6 which are reproduced as under;

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing

link, otherwise at random reliance on such evidence would result in failure of justice.

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the **strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same.** (bold added)

In the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) the following was reiterated with respect to circumstantial evidence at P.290 as under;

"In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."

So what evidence has the prosecution produced which provides all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused in this case so as to lead to a conviction based on circumstantial evidence.

- (i) Firstly we turn to the lodgment of the FIR. This was lodged on 01.08.2018 a day after the murder. The delay in lodging the FIR is 26 hours. This delay however has been explained by PW 1 Soomar Shah who was the complainant in this case who according to his evidence was working in Panjgoor Balochistan when on 31.07.2018 (the day of the murder) he was informed that his youngest sister Kainat had died in Karachi. He immediately rushed to Karachi and reached there on the next day 01.08.2018 and went to PS Sachal where he came to know that his sister

Kainat had been raped and murdered by strangulation. He told police officials that he wanted to meet his sister Ruksana and find out what happened. His sister told him that she had suspicions on her uncle Syed Altaf Shah and his sons Syed Arif Shah and Zain Shah and one Mehmood that they had raped and murdered her younger sister Kainat. He then immediately recorded his S.154 Statement at the PS which became the FIR. It can be said that the complainant consulted with his sister. However as he was not present at the time of the incident and he wanted to know what had happened as his sister was living in the same house as the deceased it was only natural that he wanted to gather first hand information from her. He then immediately narrated the facts of the case which had been told to him and were already known to the police in his S.154 Cr.PC statement. His only addition apart from what was already known about the incident was that it was added in the FIR that he came to know that the appellants committed the crime against his sister Kainat. Thus it appears to us that nothing has been cooked up by the complainant after consultation with his sister except that the finger of suspicion has been pointed at the 4 appellants by his sister Ruksnana who was living in the same house as three of the appellants along with the deceased. It was then up to the police to investigate and gather evidence against any one who may have been linked to the crime. As such we do not find the complainants meeting with his sister and thereafter lodging the FIR a day after the event to be fatal to the prosecution case as the delay has been fully explained. The superior judiciary has consistently held that in cases of rape and kidnapping for ransom the fact that the FIR is delayed by even up to three days is not fatal to the prosecution case as it is a matter of family honor and respect within the community. In this respect reliance is placed on *Zahid V State* (2020 SCMR 590).

- (ii) The complainant had no reason to falsely implicate the appellants in this case as no enmity or ill will existed between them. Admittedly the complainant was related to the deceased and the appellants however it is well settled by now that evidence of related witnesses cannot be discarded unless there is some ill will or enmity between the witnesses and the accused which has not been proven in this case by any reliable evidence. Reliance is placed on *Ijaz Ahmed V The State* (2009 SCMR 99) and *Nasir Iqbal alias Nasra and another v. The State* (2016 SCMR 2152)



- (iii) The deceased was residing with the complainants paternal uncle Syed Altaf Shah (one of the appellants), Syed Arif Shah (another appellant) was also residing in the house as he was married to the complainant's sister Ruksanna and Zain Shah (another appellant) was also living in the same house. Thus, three of the appellants were all living in the same house as the deceased at the time of her rape and murder. The appellants also informed the police during interrogation that Mehmood (another appellant) who lived in the same Mohalla had also committed the offense with them.
- (iv) Less that a day after the FIR was lodged 3 of the accused were arrested from Panjab Bus Ada where they were trying to make their escape good. The appellant Altaf Shah took the police to their Mohalla where Shahid Mehmood (another appellant) was arrested on their pointation by PW 8 IO Syed Ahmed Ali Shah who also produced memo of arrest and recovery.
- (v) On 08.08.2018 PW 6 Sher Muhammed who was a judicial magistrate recorded the judicial confession of appellant Arif Shah which reads as under;

Q. What you have to say?

Ans. As soon as, I came from my duty my brother went out for duty and it was time around 10:00 or 10:30 hours. After short while my father also went out. I gave greed to baby girl for evil doing that time my wife witnessed me and also abused me, I then went to sleep. My mother was in AC room. I brought Kainat accompanied with. After some time my mother got me woke up and said me that what has been happened to Kainat and asked me to take her at Hospital, I then took her at Darul Sehat Hospital where Doctors said me that baby has been died. Police then brought me here. This is my statement.

It is settled by now that a retracted judicial confession can be relied upon provided that it is made voluntarily, truthful and no major procedural irregularities have been committed whilst it was recorded.

Admittedly the confession was made after the appellant had been in police custody for about 6 days however there is no hard and fast rule as to the time when a confession can be made although the later it is made the less weight it should be given. The evidence does not suggest that the confession was not voluntary and it appears to be truthful in most respects, fits in with the prosecution case and nearly all of the key procedural requirements were made by the judicial magistrate and as

such we believe the confession of the appellant and place reliance on it. In this respect reliance is placed on **Ch. Muhammad V Yaqoob V The State** (1992 SCMR 1983), **Bahadur V State** (PLD 1996 SC 336), **Manjeet Singh V State** (PLD 2006 SC 30), **Muhammad Amin V The State** (PLD 2006 SC 219) and **Azeem Khan V Mujahid Khan** (2016 SCMR 274)

Significantly, in his confession appellant Arif Shah tries to exonerate his brother (appellant Zain) and his father (appellant Altaf) by saying that they went out to work but significantly this confirms that at least two other appellants (Zain and Altaf) were in the house at the same time as baby Kainat at around the time of the commission of the offense. It therefore might also form the basis of last seen evidence as the two other appellants in accordance with this confession were in the same house as the deceased around the time of her rape and murder.

(vi) Although we have placed reliance on the confession of appellant Arif Shah this still has to be corroborated by way of abundant caution by an independent source in order to implicate the other co-accused especially in a capital case.

(vii) PW 6 Dr. Zakia Khursheed who carried out the post mortem of the deceased took vaginal slides and swabs of the deceased stated as under in her evidence;

"It is correct to suggest that the vaginal swab slide were sent for chemical and DNA analysis and if in the chemical examination report human sperms were found then we can give the time for sexual assault. If the sperms were found on the chemical examination report of vaginal swab then the sperms will be sent to DNA analysis and it will be decided that whose sperm was there. **In this case the sperms is important to find out whose sperm was found on the swab.** It is incorrect to suggest that neither I have sealed the cloth of deceased nor taken vaginal swab slide. From the chemical examination report of vaginal swab we can ascertain the time of committing the offence of rape"

(viii) PW 3 Zameer Hussain who was duty officer at Sachal PS at the date of the incident went to the hospital and received the cloths of the deceased however when he realized that these were not the clothes which the deceased was wearing at the time of her rape and murder he immediately went to the house of the deceased and recovered the clothes which she was wearing at the time of the rape and murder which he duly sealed and prepared memo of seizure. He also received the sealed swabs from PW 6 Dr. Zakia Khursheed for DNA testing.

- (ix) PW 5 Dr.Muhammed Khalid carried out erectile test on the all the appellants and found them all capable of performing sex. He took the blood samples from all the appellants for DNA testing. PW 8 Syed Ahmed Ali Shah sent such blood samples by TCS to Forensic Laboratory for DNA testing at LUMHS Jamshoro and exhibited the TCS receipt.
- (x) PW 7 Haji Imtiaz Ali who was posted at PS Sachal was the mushir when PW 11 IO Mumtaz Ali took the clothes which the appellants were wearing at the time of the incident from them when they were at the lock up. PW 9 Mehboob Elahi who was also an IO of the case at one time states in his evidence that he deposited 5 sealed bundles of clothes of deceased and accused persons for DNA testing at Forensic and Molecular Biological laboratory LUMHS Jamshoro. He exhibited letter of deposit and receipt.
- (xi) PW 11 Muhammed Ahmedani who was the last IO produced the DNA correspondence and report which are produced as under for ease of reference:

**FORENSIC & MOLECULAR BIOLOGY LABORATORY
FOR D.N.A. TESTING LIAQUAT UNIVERSITY OF
MEDICAL & HEALTH SCIENCES, JAMSHORO.**

No.LUMHS/FML/399/18

Dated: 13/10/2018.

To,

The Senior Superintendent of Police (S.S.P)
Investigation-II, East Zone,
Karachi.

REFERENCE: No: SSP/INV-II/RDR/2287, Dated: 02/08/2018

SUBJECT: DNA Testing Ref: CS-SA-642.

Respected Sir,

With reference to above cited letter/subject, in connection with FIR No.3892018 U/s.302/376/34 PPC of Police Station Sachal/Sohrab Goth, we have received the following samples for DNA Testing, by courier and By Hand from SIO/P.I. Mehboob Illahi P.S. Sohrab Goth on 03/08/2018;(bold added)

<u>Description:</u>	<u>Remarks.</u>
• Valve swab sample of deceased Kainat D/o. Syed Hussain Shah.	Proceeded for DNA Analysis
• Parcel of Cloth of deceased Kainat D/o. Syhed Hussain Shah.	Proceeded for DNA Analysis

- Blood sample of suspect Hyder Ali S/o. Altaf Shah Proceeded for DNA Analysis
- Blood sample of suspect Altaf Shah S/o. Sikandar Shah Proceeded for DNA Analysis
- Blood sample of suspect Arif Shah S/o. Altaf Shah Proceeded for DNA Analysis
- Blood sample of suspect Shahid Mehmood S/o. Muhammad Ali Proceeded for DNA Analysis
- Parcel Cloths of deceased Kainat D/o. Syed Hussain Shah Proceeded for DNA Analysis
- Parcel Cloths of suspect Hyder Ali S/o. Altaf Shah Proceeded for DNA Analysis
- Parcel Cloths of suspect Altaf Shah S/o. Sikandar Shah Proceeded for DNA Analysis
- Parcel Cloths of suspect Arif Shah S/o. Altaf Shah Proceeded for DNA Analysis
- Parcel Cloths of suspect Shahid Mehmood Muhammad Ali Proceeded for DNA Analysis

Following are requirement for further process of DNA Profiling:

1. The prescribed fee Rs.42000/- (Forty two thousand only) Challan Attached.
2. The additional fees will be communicated, after analysis of above Material/Evidences, if applicable.

Therefore, it is requested to your honor that may kindly facilitate the above requirements of the case for further process of DNA Profiling.

Sd/-

Mr. Muhammad Hussain
Forensic DNA Analyst,
Forensic Molecular Biology Laboratory
For DNA Testing, LUMS Jamshoro.
Phone: 03003069594.

This letter proves that the material sent for DNA testing was sent to the concerned laboratory within a day of its recovery.

Set out below is the final DNA report.

FORENSIC & MOLECULAR
BIOLOGY LABORATORY, FOR DNA TESTING

No. /FML/493/18

Dated: 18/10/2018.

Attention:

The Senior Superintendent of Police (S.S.P)
Investigation-II, East Zone,
Karachi.

Subject: DNA Test Report.

Lab. ID; CS-SA-642-2287-2018 Letter No.SSP/Inv-II/DRD/2287 Date: 02/08/2018.
FIR No.389/2018, U/S. 302/376(i)/34 PPC P.S; Sachal District: Malir Karachi.

Standard samples received:

Item No.	Description	Received from/Date	P.M/MLC/No./Seals/ date
----------	-------------	--------------------	-------------------------

1.0	Vaginal Swab sample of deceased Kainat D/O Syed Hussain Shah	By courier on 03/08/2018	P.M No.334/2018, Dated 31/07/2018, No. of parcel 01, of seals 01, WMLO, JPMC, Karachi.
2.0	Parcel of Cloths of deceased Kainat D/o Syed Hussain Shah	By courier on 03/08/2018	P.M No.334/2018, Dated 31/07/2018, No. of parcel 01, of seals 01, WMLO, JPMC, Karachi.
3.0	Parcel of Cloths of deceased Kainat D/o Syed Hussain Shah	By hand from P.I/SIO Mehboob Illahi, P.S. Sohrab Goth on 13/08/2018	No.398/2018, Dated 02/08/2018, No. of parcel 01, of seals 05, SIO/SIP P.S Sachal, Karachi.
4.0	Blood Sample of accused Hyder Ali S/o. Altaf Shah	By courier on 03/08/2018	ML No.6006/18, Dated 02/08/2018, No. of parcel 01, of seals 01, MLO, A.S.H, Karachi.
5.0	Blood sample accused Altaf Shah S/o. Sikandar Shah	By courier on 03/08/2018	ML No.6007/18, Dated 02/08/2018, No. of parcel 01, of seals 01, MLO, A.S.H, Karachi.
6.0	Blood sample accused Arif Shah S/o. Altaf Shah	By courier on 03/08/2018	ML No.6008/18, Dated 02/08/2018, No. of parcel 01, of seals 01, MLO, A.S.H, Karachi.
7.0	Blood sample accused Shahid Mehmood S/o. Mohammad Ali	By courier on 03/08/2018	ML No.6009/18, Dated 02/08/2018, No. of parcel 01, of seals 01, MLO, A.S.H, Karachi.
8.0	Parcel labeled as Cloths of accused Hyder Ali S/o. Altaf Shah	By hand from P.I/SIO Mehboob Illahi, P.S. Sohrab Goth on 13/08/2018	No.389-1/18, Dated 07/08/2018, No. of parcel 01, of seals 03, SIO/SIP P.S Sohrab Goth/Gadap Town, Karachi.
9.0	Parcel labeled as Cloths of accused Altaf Shah S/o. Sikandar Shah	By hand from P.I/SIO Mehboob Illahi, P.S. Sohrab Goth on 13/08/2018	No.389-2/18, Dated 07/08/2018, No. of parcel 01, of seals 03, SIO/SIP P.S Sohrab Goth/Gadap Town, Karachi.
10.0	Parcel labeled as Cloths of accused Arif Shah S/o. Altaf Shah	By hand from P.I/SIO Mehboob Illahi, P.S. Sohrab Goth on 13/08/2018	No.389-3/18, Dated 07/08/2018, No. of parcel 01, of seals 03, SIO/SIP P.S Sohrab Goth/Gadap Town, Karachi.
11.0	Parcel labeled as Cloths of accused Shahid Mehmood S/o. Mohammad Ali	By hand from P.I/SIO Mehboob Illahi, P.S. Sohrab Goth on 13/08/2018	No.389-4/18, Dated 07/08/2018, No. of parcel 01, of seals 03, SIO/SIP P.S Sohrab Goth/Gadap Town, Karachi.
12.0	Blood sample of Mst. Bibi Asia W/o. Hussain Shah (Mother of deceased bay Kainat)	By hand from HC Suleman Brohi, P.S. Gulshan-e-Maymar on 16/08/2018	No.389-18/18, Dated 16/08/2018, No. of parcel 01, of seals 02, SIO P.S Sohrab Goth/Gadap Town, Karachi.

Items Description:

- 1.0 Sample of deceased Kainat D/o. Syed Hussain Shah.
- 2.0 Orange pinkish color shalwar Qamees of deceased Kainat D/o. Syhed Hussain Shah.
- 3.0 Yellowish color shalwar Qamees of deceased Kainat D/o. Syed Hussain Shah.
- 4.0 Blood Sample of accused Hyder Ali S/o. Altaf Shah.
- 5.0 Blood Sample of accused Altaf Shah S/o. Sikandar Shah.
- 6.0 Blood sample of accused Arif Shah S/o. Altaf Shah.
- 7.0 Blood sample of accused Shahid Mehmood S/o. Mohammad Ali
- 8.0 Cloths of accused Hyder Ali S/o. Altaf Shah.
- 9.0 Cloths of accused Altaf Shah S/o. Sikandar Shah.
- 10.0 Cloths of accused Arif Shah S/o. Altaf Shah.
- 11.0 Cloths of accused Shahid Mehmood S/o. Mohammad Ali.

12.0 Blood sample of Mst. Bibi Asia W/o. Hussain Shah (Mother of deceased baby Kainat).

13.0 Methodology:

Deoxyribonucleic acid (DNA) was extracted from above items by Organic Extraction Procedures; and Promega DNA IQ-system & QIAamp DNA Investigator Kit and amplified by Polymerase Chain Reaction (PCR) using PowerPlex® Fusion System. The amplified products were analyzed on ABI3130 Genetic Analyzer.

The Male DNA profiles obtained from Semen stains/Sperm fractions identified on Item: 1.0 & Item 3.0 (Vaginal swab sample & Cloths of deceased Kainat D/o. Syed Hussain Shah) shares the required alleles with the DNA profiles obtained from Item 6.0 (Blood sample of accused Arif Shah S/o. Altaf Shah) and partially shares the alleles with DNA profiles obtained from Item 4.0, 5.0 and 7.0 (Blood Sample of accused Hyder Ali S/o. Altaf Shah, Blood sample of accused Altaf Shah S/o. Sikandar Shah and Blood sample of accused Shahid Mehmood S/o. Mohammad Ali).

The female DNA Profile obtained from Vaginal secretions/Human Blood stains identified on Item 10.0 (Cloths of accused Arif Shah S/o. Altaf Shah) shares the required alleles with female DNA Profile obtained from Item 1.0 (Vaginal Swab sample of deceased Kainat D/o. Syed Hussain Shah).

Conclusion:

The accused Arif Shah S/o. Altaf Shah (Item 6.0) is the contributor of Male DNA/Sperm fractions found on vaginal swab sample & Cloths of deceased Kainat D/o. Syed Hussain Shah (Item 1.0 & Item 3.0) and the Hyder Ali S/o. Altaf Shah, Altaf Shah S/o. Sikandar Shah and Shahid Mehmood S/o. Mohammad Ali (Item 4.0, 5.0 and 7.0) are the contributors of alleles/Male DNA/Sperm fractions found on vaginal swab sample & Cloths of deceased Kainat D/o. Syed Hussain Shah (Item 1.0 & Item 3.0).

The deceased Kainat Shah D/o. Syed Hussain Shah (Item 1.0) is the donor of vaginal secretions/Human Blood found on cloths of accused Arif Shah S/o. Altaf Shah (Item 6.0). (bold added)

Sd/-
Mr. Muhammad Hussain Soomro
Forensic DNA Analyst
Department of Forensic Medicine
& Toxicology
LUMHS, Jamshoro

Sd/-
Miss. Rizwana Khanzada
Forensic DNA Analyst
Department of Forensic Medicine
& Toxicology,
LUMHS, Jamshoro

Sd/-
Dr. Ali Muhammad Waryah, Ph.D
Incharge
Molecular Biology (Genetics) Laboratory,
LUMHS, Jamshoro

Sd/-
Prof. Dr. Muhammad Akbar Kazi,
Chairman,
Department of Forensic Medicine &
Toxicology, LUMHS, Jamshoro.

With regard to the safe chain of custody it was held in the recent Supreme Court case of Zahid and Riaz Ali V State dated 03.03.2020 (unreported) in Jail Appeal No.172 of 2018 which concerned rape and the safe custody of DNA swabs being sent to the chemical examiner as under at para 5 in material part;

"The chemical examiner's report produced by the lady doctor states that the seals of specimens sent for chemical examination were received intact and it was the chemical examiner who had broken open the seals,

therefore, the contention of the petitioners' learned counsel regarding the safe transmission of the specimens is discounted both by this fact as well as by the fact that no question was put regarding tampering of the said seals."

The DNA correspondence and report mentioned above reveals that the same situation applies in this case.

We find that the report proves two things conclusively;

(a) That the complete chain of custody was maintained for all items which were sent for DNA testing. No allegation was even made of tampering with any part of the DNA report or the items which were sent for DNA testing and as such the DNA report was legally admissible in court and indeed went unchallenged by the appellants.

(b) That all 4 appellants raped/sexually assaulted the deceased.

With regard to the results of DNA testing it has recently been held by the supreme court in its judgment dated 07.01.2021 passed in the case of Ali Haider @ Pappu v Jameel Hussain, etc (PLD 2021 SC 362) that:

"DNA, strongest corroborative piece of evidence today.

10. DNA evidence is considered as a gold standard to establish the identity of an accused. As a sequel of above discussion, it can safely be concluded that DNA Test due to its accuracy and conclusiveness is one of the strongest corroborative piece of evidence. In *Salman Akram Raja* case this Court has held that DNA test help provides the courts the identity of the perpetrator with high degree of confidence, and by using of the DNA technology the courts are in a better position to reach at a just conclusion whereby convicting the real culprits and excluding the potential suspects, as well as, exonerating wrongfully involved accused. DNA test with scientific certainty and clarity points towards the perpetrator and is, therefore, considered one of the strongest corroborative evidence today, especially in cases of rape. The usefulness of DNA analysis, however, depends mostly on the skill, ability and integrity shown by the investigating officers, who are the first to arrive at the scene of the crime. Unless the evidence is properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility into a court of law.

(xii) That the police PW's had no enmity or ill will towards the appellants and had no reason to falsely implicate them in this case by for example making up their arrest at the bus area and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on

Mushtaq Ahmed V The State (2020 SCMR 474). As per planting the appellants blood DNA on the deceased's vaginal swabs we find this almost impossible to be done as the police would have had no such expertise. Even other wise as mentioned earlier the police had no enmity or ill will with any of the appellants which would cause them to implicate the appellants in a false case.

(xiii) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State (1995 SCMR 1793)** and **Khadim Hussain v. The State (PLD 2010 Supreme Court 669)**.

(xiv) All the PW's gave there S.161 Cr.PC statements with promptitude which left no time for collusion or concoction and there were no improvements in the evidence which they gave in court as PW's under oath so as to render their evidence at trial unreliable.

(xv) None of the evidence of any PW was dented on cross examination so as to render their evidence unreliable. Rather such evidence was given in a straightforward manner and was confidence inspiring.

(xvi) That it does not appeal to logic, reason or commonsense that the complainant would allow the real rapists and murderers of his baby sister to get off scot free by substituting them with innocent people. In this respect reliance is placed on **Allah Ditta V State (PLD 2002 SC 52)**.

(xvii) We have also examined the defence case. The defence called three DW's. The first was Muhammed Shahid who attempted to suggest that Haider Ali Shah was arrested from a parking lot of a shopping centre as he was a valet driver however we place no reliance on his evidence as he was a friend and work colleague of another appellant and also could not confirm that Haider Ali Shah was present the whole time. He also made no effort to record his statement before the police at the time of the investigation and only came forward at the time of the trial. During cross examination of the PW's no suggestion of alibi was ever put to any PW. The second DW was Yumul Haq who tried to give an alibi for appellant Shahid Mehmood by stating that he was with him at the time of the incident and that his brothers had been arrested in order to compel him to appear before the police however we disbelieve his evidence as he was a close friend of the accused and no brother of the accused came forward to support his story that they were in custody. He also made no effort to record his statement before the police at the time of the investigation and only came forward at the time of the trial. During cross examination of the PW's no suggestion of alibi was ever put to any PW. The final DW was Roshna who was the wife of appellant Altaf Shah whose evidence

is completely unbelievable. According to her evidence the two elder sisters were beating the deceased with pipes and twice she attempted to intervene but was shooed away. On the second time she called Altaf (appellant) and who told her to ask Arif Shah (another appellant) who was in the house at the time to take the deceased to hospital. Firstly, her story is completely contradicted by the medical evidence. Secondly it does not appeal to reason, logic or commonsense that when she saw the younger sister being hit with pipes why she did not intervene and instead went and sat in her room or why she did not tell Arif to immediately intervene who was also in the house. Her evidence has simply been made up in order to save the skin of her husband and we completely disbelieve her evidence.

14. Thus, based on our reappraisal of the evidence as discussed above we find that the evidence of the PW's provides a believable corroborated unbroken chain of events which makes an unbroken chain where one end of it touched the dead body of Mst Kainaat and the other the neck of the appellants from the time the complainant came to know about the rape and murder of his sister to the registration of the FIR naming the appellants as suspects to the post mortem and cause of death of his sister by rape and strangulation to the recovery of clothes which the deceased wore at the time of her rape and murder and vaginal swabs collected by the MLO to the arrest of appellants to appellant Arif's confession before the judicial magistrate to the appellants clothes and blood, the deceased vaginal swabs and clothes all being sent for DNA testing to their erectile test to the positive DNA reports in respect of all 4 appellants (DNA reports do not lie and are in nearly all cases 100% reliable provided that safe custody was maintained as in this case) on the appellants rape of the deceased and as such the prosecution has proved its case against all 4 appellants through circumstantial evidence beyond a reasonable doubt and as such we maintain all the convictions against all the appellants in the impugned judgment which we uphold.

15. With regard to sentencing ordinarily such brutal crimes against a minor 7 year old girl would justify the death penalty for each of the appellants. Since however the prosecution case is based solely on circumstantial evidence which needs to be considered with a great deal of caution especially in a capital case we consider it appropriate to reduce

455

the death sentence for all the appellants to one of Life Imprisonment in respect of each count in which they were sentenced to death . Apart from the above modification in sentence all the other sentences, fines, compensation etc shall remain in tact.

16. The upshot is that all the appeals of each appellant are dismissed however the all the appellants sentences are modified as above and the confirmation reference is answered in the negative in respect of each of the appellants.

17. The appeal and confirmation reference stand disposed of in the above terms.

MAK/PS